HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 557 Parental Rights Amendment
SPONSOR(S): Coley and others
TIED BILLS: None **IDEN./SIM. BILLS:** SM 954

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Federal Affairs Subcommittee	9 Y, 2 N	Cyphers	Cyphers
2) Judiciary Committee	16 Y, 1 N	De La Paz	Havlicak

SUMMARY ANALYSIS

There are certain rights that the United States Supreme Court has deemed "fundamental" to every American citizen. In the broadest view, those fundamental rights are enumerated in the Bill of Rights. However, the Court has found that fundamental rights are not limited to those specifically enumerated in the United States Constitution. There are other, non-enumerated, fundamental rights that emanate from the "penumbras" of the enumerated rights. Non-enumerated rights, by their very nature, are subject to revision based on the ebb and flow of differing American and legal ideologies.

Although the right of parents to direct the upbringing and education of their children has long been recognized by the United States Supreme Court, this memorial, if the amendment therein proposed were to be enacted, would solidify the fundamental parental right as a constitutionally enumerated right.

There is concern among some parental rights advocates that a weakening in the fundamental right of parents to raise their children is taking place. This memorial urges the United States Congress to propose and submit to the states for ratification an amendment to the United States Constitution enumerating a fundamental parental right.

Section 1 of the proposed amendment states that, "The liberty of parents to direct the upbringing and education of their children is a fundamental right." This provision ensures that currently held parenting rights will be enumerated in the U.S. Constitution.

Section 2 of the proposed amendment provides that, "Neither the United States nor any State shall infringe upon this right without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served." This section essentially codifies the standard of strict scrutiny that courts impose when determining whether or not a law that infringes on a fundamental right is constitutional.

Section 3 of the proposed amendment provides that, "No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article."

The House Memorial does not amend, create, or repeal any provisions of the Florida Statutes.

The House Memorial has no fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

There are rights held by citizens of the United States which are widely held to be "fundamental." The basis for those rights is found first in the Declaration of Independence of July 4, 1776. It states, in part:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[1]

The recognition of tangible, "unalienable Rights," in the opening clauses of the Declaration of Independence sets the tone for articulating the foundational and enumerated rights supplied later through the ratification of the United States Constitution, its first ten amendments known as the Bill of Rights, and the remaining 17 Amendments to the U.S. Constitution.

Enumerated fundamental rights including the freedom of speech (1st Amendment), freedom of religion (1st Amendment), the right to vote (Article I and Amendments 14, 15, 17 and 19), and equal protection under the law (14th Amendment) are easily discernible through the reading of the text of the U.S. Constitution.[2] However, there is a non-enumerated body of rights, secured through the interpretation of the U.S. Constitution, that are also recognized as "fundamental."

These fundamental rights are considered to "emanate" from the "penumbras" of the enumerated rights. In *Griswold v. Connecticut*, the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[3] Justice Douglas makes note of several instances where this is the case.

> "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights."[4]

He goes on to say,

> "By *Meyer v. Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."

He concludes the section of the Court's opinion by asserting:

> "Without those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases."

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[1] http://www.ushistory.org/DECLARATION/document/index.htm
[2] http://www.usconstitution.net/const.html#A1Sec4
[3] http://www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZO.html
[4] *Id.*

The penumbral rights Douglas holds to in *Griswold v. Connecticut,* perhaps gives way in the end to the philosophy underlying the opinion.

He writes:

> "We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[5]

The statement by Douglas demonstrates the presence of philosophical, as well as legal, roots to at least some fundamental rights which are not enumerated. Though supported by tradition, law, and ancient institutions, without enumeration, fundamental rights may be seen by some as somewhat vulnerable compared with enumerated rights to the ebb and flow of a changing society and Court.

Parenting Rights in Case Law

Although *Meyer* v. *Nebraska* (1923) and *Pierce* v. *Society of Sisters* (1925), were the first Supreme Court decisions to suggest the basic right of parents to raise their children, in the *Wisconsin v. Yoder* decision of 1972, the United States Supreme Court clearly articulated the fundamental role of parents in the upbringing of children and their right to make decisions on behalf of their children to that end. The Court recognized the role of state as, "parens patriae" (parent of his country) to save children from abusive or unfit parents, but failed to find cause to invoke that role on behalf of the state of Wisconsin in the Yoder case.[6] In writing the opinion of the Court, Justice Burger noted the absence of direct harm caused to the children involved in the case:

> "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence."[7]

Justice Burger went on to express a reservation in giving the State too large a role in the "protection" of children:

> "Indeed it seems clear that if the State is empowered, as *parens patriae,* to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child."[8]

The Court then articulated the specific fundamental right held by parents:

> "Even more markedly than in *Prince*[9]*,* therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their

[5] *Id.*
[6] http://scholar.google.com/scholar_case?case=5191879394794619665&q=wisconsin+v.+yoder+1972&hl=en&as_sdt=2,10&as_vis=1
[7] *Id.*
[8] *Id.*
[9] Prince v. Massachusetts, 321 U.S. 158 (1944).

children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[10]

The Court reflected on the findings a previous court made in *Pierce v. Society of Sisters* to support its determination regarding the fundamental right of parents in the education and upbringing of their children:

> "Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.
>
> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[11]

In *Troxel v. Granville*, the Supreme Court found further cause to support the establishment of parents' fundamental right to raise and educate their children.[12] In writing the opinion for the majority, Justice O'Connor noted the existence of "penumbras" in the U.S. Constitution when she wrote:

> "The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.,* at 720; see also *Reno* v. *Flores,* 507 U. S. 292, 301-302 (1993)."[13]

She concluded by declaring that penumbras emanating from the 14th Amendment to the U.S. Constitution protect the rights of parents in raising their children, and that those rights are supported by 75 years of prior Court decisions. Justice O'Connor wrote:

> "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."[14]

In rendering his dissent, Justice Scalia noted the variety of opinion among the Justices in applying legal precedents involving parental rights, and questioned the reliance on previous decisions to inform the Court's decision in the *Troxel v. Granville* case.

> "The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context."[15]

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[10] *Id.*
[11] *Id.*
[12] http://scholar.google.com/scholar_case?case=10935528927815644277&q=troxel+v.+granville&hl=en&as_sdt=2,10&as_vis=1
[13] *Id.*
[14] *Id.*
[15] *Id.*

Current Situation

There is growing concern among parental rights advocates that a weakening in the fundamental right of parents to raise their children is taking place. Part of this concern stems from a perceived ambiguity regarding the fundamental nature of parental rights in the *Troxel v. Granville* case, and part of the concern is based on international attempts to create broad-based rights for children which may be in conflict with the societal and legal standards of parenting in the United States.

The Convention on the Rights of the Child, a product of the United Nations Committee on the Rights of the Child, is a legally binding treaty designed by its creators, "to incorporate the full range of human rights—civil, cultural, economic, political and social rights." The Convention, created in 1989, sets out these rights in 54 articles and two Optional Protocols.[16] Critics believe that the articles represent an infringement on the sovereignty of the United States. The United States is not a signatory to the Convention, but there is concern that without the establishment of enumerated, fundamental rights for parents in the U.S. Constitution, the established case law protecting those rights could eventually be superseded by international treaty.

The Constitution of the United States provides methods for the proposition and ratification of amendments.[17] The first method allows Congress to propose the amendment themselves, if there is two-thirds support for the amendment in both houses. The second method allows two-thirds of the states to call for a Convention for proposing amendments. Regardless of the method, any proposed amendments must be approved by three-fourths of the states in order to be ratified.

Effect of Proposed Changes

This memorial urges the United States Congress to propose and submit to the states for ratification an amendment to the United States Constitution enumerating a fundamental parental right.

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Section 2 of the proposed amendment provides that, "Neither the United States nor any State shall infringe upon this right without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served." This section essentially codifies the standard of strict scrutiny that courts impose when determining whether or not a law that infringes on a fundamental right is constitutional.

Section 3 of the proposed amendment provides that, "No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article."

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

WHEREAS, the right of parents to direct the upbringing and education of their children is a fundamental right protected by the Constitutions of the United States and the State of Florida, and

[16] http://www2.ohchr.org/english/law/crc.htm
[17] http://www.usconstitution.net/const.html#A1Sec4

WHEREAS, our nation has historically relied first and foremost on parents to meet the real and constant needs of children, and

WHEREAS, the interests of children are best served when parents are free to make childrearing decisions about education, religion, and other areas of a child's life without state interference, and

WHEREAS, the United States Supreme Court in Wisconsin v. Yoder held that "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition," and

WHEREAS, the United States Supreme Court in Troxel v. Granville produced six different opinions on the nature and enforceability of parental rights under the United States Constitution, creating confusion and ambiguity about the fundamental nature of parental rights in the laws and society of the several states, and

WHEREAS, a number of members of Congress have introduced joint resolutions that propose an amendment to the United States Constitution to prevent erosion of the enduring American tradition of treating parental rights as fundamental rights, commonly referred to as the Parental Rights Amendment, and

WHEREAS, the Parental Rights Amendment will add explicit text to the Constitution of the United States to forever protect the rights of parents as they are now enjoyed, without substantive change to current state or federal laws respecting these rights, and

WHEREAS, such enumeration of these rights in the text of the United States Constitution will preserve them from being infringed upon by the shifting ideologies and interpretations of the United States Supreme Court…

B. SECTION DIRECTORY:

None

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable

2. Other:

   None

B. RULE-MAKING AUTHORITY:

Not Applicable

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES